



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

Mr. Clifford D. Wilson III, P.E.
Deputy Secretary for Regulatory Programs
Florida Department of Environmental Protection
3900 Commonwealth Boulevard MS 15
Tallahassee, Florida 32399

Dear Mr. Wilson,

The Environmental Protection Agency Region 4 has completed a review of the Florida Department of Environmental Protection (DEP) implementation of the four RCRA recommendations in the final State Review Framework (SRF) Report, dated May 6, 2013. To evaluate the implementation, EPA conducted a follow-up file review using the national EPA RCRA database, RCRAInfo, and DEP's online data system, OCULUS. The file review included 30 inspection files from the six DEP District offices, in addition to the ten formal enforcement actions completed in FY2013. The review also evaluated the SRF updates provided from Mr. Jorge Caspary, Director of the DEP Waste Management Division, in a letter dated August 16, 2013; your August 20, 2014 memorandum to DEP District Directors; and information provided by John Coates, Assistant Director of the DEP Waste Management Division, on October 14, 2014. The results of the file review were fact-checked with DEP Division management and designated staff prior to making final determinations (see enclosure).

The file review findings indicate that some significant problems existed in the identification of RCRA Significant Noncompliers (SNCs). Additional issues were also found concerning timely and appropriate enforcement at SNC facilities. After conferring with the DEP Waste Management Division during several meetings, it appears that these problems stem from revisions to Department-wide enforcement guidelines since the last EPA SRF evaluation. DEP's new enforcement guidelines are not aligned with the EPA enforcement principles defined in the Hazardous Waste Enforcement Response Policy (ERP). EPA developed the ERP to ensure national consistency in addressing the most serious violators with timely, visible, and effective enforcement. The ERP also ensures that businesses that improperly manage hazardous waste do not reap a financial competitive advantage over other businesses that comply with the law. As established in the Memorandum of Agreement (2001) between DEP and EPA, the state agreed to take timely and appropriate enforcement as defined in the Hazardous Waste ERP.

In the analysis of 50 facilities statewide for the follow-up file review, DEP failed to meet the ERP national criteria in 32% of the RCRA cases. It is EPA's concern that the DEP's adoption of a compliance hierarchy based on compliance assistance notably diverges from EPA's enforcement principles of appropriate sanctions to level the playing field and deter noncompliance. While EPA supports the use of compliance assistance as one of the tools to

achieve compliance, it cannot be used to the exclusion of other appropriate enforcement instruments. In addition, the potential exposure to hazardous waste and the violator's deviation from regulatory requirements must also be considered in the determination of the most appropriate enforcement response.

On October 14, 2014, DEP Waste Division management provided the revised DEP Hazardous Waste Program guidelines to EPA in response to the SRF file review findings and a number of substantive discussions with EPA and DEP personnel. The revised guidelines now provide the DEP District Offices the flexibility to follow the Hazardous Waste ERP in making enforcement decisions. Implementation is critical in resolving the identified state performance issues. For the interim, EPA will conduct differential oversight of the DEP RCRA compliance and enforcement program until consistent adherence to the Hazardous Waste ERP is demonstrated. If you have any questions, please contact me at (404) 562-9741.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Scott Gordon".

J. Scott Gordon
Associate Director
Office of Environmental Accountability

Enclosure

Cc: Jorge Caspary, Florida DEP

Enclosure

RCRA DEP SRF - Follow-up File Review Findings

Below are the findings from the follow-up file review for each of the four RCRA recommendations in the final DEP SRF Report (May 2013).

- (1) **SRF Element 2 (Data Accuracy) finding:** DEP has created a successful data linkage in RCRAInfo that will now link resolved violations with informal enforcement actions in the database. This recommendation is considered complete.
- (2) **SRF Element 8 (Identification of SNC) finding:** In the SRF Round 2 evaluation, it was found that DEP was taking formal RCRA enforcement actions at certain SNC facilities, but failing to enter the SNC designation in RCRAInfo. Timely and accurate SNC identification is essential so that significant compliance problems are addressed in a prompt manner, and correct data is available to the public concerning problem facilities in their community. To examine if the issue of SNC identification has been resolved, a follow-up file review was conducted by examining five inspection files from each of the six DEP District offices (a total of 30 files). Files were selected from facilities that had the largest number of violations, since these were more likely to be SNC-caliber facilities.

The file review findings indicate that six facilities were not identified as SNC facilities by DEP. These facilities are considered SNCs in the ERP, in part because the violations "substantially deviated" from the requirements put in place for the safe management of hazardous wastes. For example, one SNC facility identified was storing hazardous waste in a large tank without the proper inspections and structures in place to contain a spill if one had occurred. There was no actual release, but without discovery during the DEP inspection, the tank storage could have continued without provisions in place to properly secure and manage the hazardous waste and better protect workers at the facility.

On October 14, 2014, DEP Waste Division management provided to EPA the revised DEP "Guidelines for Characterizing Hazardous Waste, Used Oil, Universal Waste, and Dry Cleaner Violations" and the "Hazardous Waste Harm and Potential for Harm Ranking System", both dated October 1, 2014. The revised guidelines now provide the DEP District Offices the flexibility to follow the Hazardous Waste ERP in making enforcement decisions. EPA will conduct differential oversight of the DEP RCRA compliance and enforcement program until consistent adherence to the Hazardous Waste ERP is demonstrated. Until that determination is made this recommendation will remain open.

- (3) **SRF Element 11 (Penalty Calculation Method) finding:** The ERP requires that, at a minimum, final penalties recover any economic benefit gained by the facility for not complying with the regulations. In certain situations the economic benefit could be significant, especially if the company avoided getting a permit, failed to install groundwater

monitoring for detecting contamination, or have the insurance to guarantee that there are funds available to clean up any spill or contamination.

From the files reviewed, seven of the enforcement actions had economic benefit of noncompliance calculations that were not consistent with national standards in that they did not include the avoided costs for operating without a permit and/or sending wastes to the proper hazardous waste disposal facility. The economic benefit of noncompliance was not recovered in the final penalties.

On October 14, 2014, DEP Waste Division management provided to EPA the "FDEP RCRA Economic Benefit Calculations Guidance" (dated October 1, 2014). This guidance was developed to assist the state in determining appropriate estimates for delayed and/or avoided noncompliance. EPA supports the guidance, and will conduct differential oversight of the DEP RCRA enforcement program to evaluate penalty calculations using the new guidance. Until that evaluation is made this recommendation will remain open.

- (4) SRF Element 12 (Final Penalty Assessment & Collection) finding:** The documentation of rationale for penalty adjustments has improved considerably since the most recent SRF evaluation. In the follow-up file review, nine of the ten enforcement actions reviewed documented the difference and rationale between the initial and final assessed penalty. DEP has instituted a process to routinely audit penalty cases to ensure proper documentation. This recommendation is considered complete.

SRF Element 10 (Timely & Appropriate Enforcement) finding: In addition to the continuing issues identified in the most recent SRF report, new issues were identified in the file review under SRF Element 10:

- **Formal Enforcement** – The appropriate response to the violations at a SNC facility is a formal enforcement action. This is an agreement or order that mandates compliance and imposes penalties that reflect the seriousness of the violations and recovers any monetary gain from not complying with the regulations. Of the 40 inspection files reviewed, eight facilities (20%) were SNC-caliber facilities where no formal enforcement action was issued. The six facilities without SNC designations in Element 8 above are a subset of these eight facilities that did not have formal enforcement actions. EPA may initiate appropriate actions on any unaddressed SNCs.
- **Enforcement Response Times** – The enforcement timelines in the ERP are established to expeditiously return violators to compliance. A formal enforcement action at a SNC facility should be resolved within 360 days. In the files reviewed, seven enforcement cases exceeded this timeline, which includes four enforcement actions that were issued after the file review had been completed.